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Singh Singh

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No-~~434~~⁴³⁴/2006

APPELLANT:-

(IN JAIL from 1.8.05)

Pankaj Lakara

S/o Alekjender Lakara,

aged about 20 years

R/o Village Bhandari

P.S.H. & Tah. Kunkuri

Distt-Jashpur (C.G)

VERSUS

RESPONDENT:-

State of Chhattisgarh

Through station officer

P.S.H. & Tah. Kunkuri

Distt-Jashpur (C.G)

Criminal appeal U/s 374 of
Criminal procedure code

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.434/2006

Pankaj Lakara

Vs.

The State of Chhattisgarh

Post for Judgment : 10.08.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

10.08.2006

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.434/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Pankaj Lakara

Versus

The State of Chhattisgarh

Shri J.K. Shastri, learned counsel for the appellant.

Shri Ashish Shukla, Govt. Advocate for the State.

JUDGMENT

(Delivered on this 10th day of August 2006)

This appeal is directed against the judgment dated 25.4.2006 delivered by Shri G.C. Bajpai, Sessions Judge, Jashpur in Sessions Case No.101/2005 whereby the appellant was convicted under Sections 363, 366, 376 (1) and 341 I.P.C. and was sentenced under Sections 363, 366, 376 (1) to undergo rigorous imprisonment for two years, five years and seven years respectively and also to simple imprisonment for one month under Section 341 I.P.C. The sentences were ordered to run concurrently.

2. Briefly stated the prosecution case is that on 26.7.2005 the prosecutrix, aged about 13 years, was sent by her mother Kaldina P.W.2 for bringing *Soyabeen* chunks from Khan Shop. The prosecutrix left her house on a cycle and after purchasing *Soyabeen* chunks from Khan Shop was returning home. Near the school, the appellant Pankaj Lakda stood with one Pratap, the cousin brother of the prosecutrix.

Pratap called her and asked to give her cycle to him. The prosecutrix gave her cycle to Pratap who left the place. The appellant thereafter held the hand of the prosecutrix and dragged her inside the school room. She attempted to shout but the appellant gagged her mouth. Inside the kitchen room of Primary School, Bhandri the appellant removed his underwear and also the underwear of the prosecutrix and committed rape on the prosecutrix.

3. In the meanwhile, since the prosecutrix did not return home, her mother sent her son Amol Bada in search of her. Amol returned with the cycle of the prosecutrix and told her that he had met Pratap who had given her cycle to him. Upon this information, Kaldina P.W.2 herself went in search of the prosecutrix. When she entered the kitchen room of the school, she saw that the appellant was committing rape on the prosecutrix. She caught the appellant by his neck. The prosecutrix told her that the appellant was gagging her mouth whenever she wanted to shout and had forcibly committed rape on her. The appellant fled from the place of occurrence.

4. F.I.R. was lodged by the prosecutrix on 27.7.2005 at 1.30 P.M. in P.S. Kunkuri situated 10 kilometers east. On 28.7.2005 upon medical examination, Dr. Sangita Tirki P.W.8, found that there was complete and fresh rupture of hymen of the prosecutrix who complained of pain in her private parts. It was opined that the prosecutrix had been subjected to sexual intercourse. No external injury was found on her. Dr. S. Toppo P.W.3 medically examined the appellant on 1.8.2005 and opined that he was capable of performing sexual intercourse. Radiological examination of the prosecutrix for

confirmation of age was conducted by Dr. George. It was estimated vide opinion dated 13.09.2005 that the prosecutrix was aged between 15 to 17 years.

5. After completion of investigation, the appellant was prosecuted under Section 341, 363 and 376 I.P.C. The learned trial Judge framed charge under Sections 341, 363, 366 and 376(1) of the I.P.C. The appellant abjured the guilt. No evidence in defence was led by the appellant. The prosecution examined as many as 8 witnesses. Relying upon the evidence led by the prosecution, the learned Sessions Judge convicted and sentenced the appellant as aforesaid in paragraph 1 after recording a finding that age of the prosecutrix was more than 16 years on the date of occurrence.

6. Shri J.K. Shastri, learned counsel for the appellant has assailed the impugned judgment on the ground that the evidence of the prosecutrix clearly established her consent in the sexual intercourse committed by the appellant with the prosecutrix. It was urged that the learned trial Judge had recorded a clear finding in paragraph 9 that the prosecutrix was aged above 16 years on the date of occurrence. It was urged that the testimony of Dr. Sangita Tirkey P.W.8 in paragraph 8 also established that the prosecutrix was aged more than 16 years on the date of occurrence. On this ground alone, it was contended that conviction of the appellant under Sections 363, 366, 376(1) and 341 of I.P.C. was liable to be set aside.

7. On the other hand, Shri Ashish Shukla, learned Government Advocate while arguing in support of the impugned judgment contended that the evidence of the prosecutrix was wholly

unrebutted that the appellant had committed forcible sexual intercourse with her without her consent. A presumption under Section 114 A of the Evidence Act arose against the appellant, which stood wholly unrebutted by him. It was also urged that a defence of false implication due to animosity had also been raised by the appellant in paragraph 17 of the testimony of the prosecutrix. In this view of the matter, the defence of consent of the prosecutrix in the sexual act committed by the appellant was liable to outright rejection. Reliance was placed on State of M.P. v. Balu 2005 Supreme Court Cases (Cri) 270 (Para 14). Lastly, it was contended that the medical evidence of Dr. Sangita Tirki P.W.8 clearly established a violent forcible rape by the appellant with the prosecutrix which completely negated the defence of consent of the prosecutrix.

8. Having heard rival submissions, I have perused the record of Sessions Case No.101/2005. The wholly unrebutted testimony of the prosecutrix P.W.1. and her mother Kaldina P.W.2 proved that the prosecutrix was sent by her mother for bringing *Soyabeen* chunks from the Khan Shop at 6.00 P.M. The prosecutrix deposed that while she was returning from Khan Shop, Pratap called her and took her cycle. Thereafter, the appellant held her hand and dragged her inside the kitchen room of the school. She categorically stated that the appellant committed sexual intercourse with her inside the school room. Her testimony is wholly corroborated by her mother Kaldina P.W.2, who saw the appellant actually committing rape on the prosecutrix. Kaldina P.W.2 has also stated that the prosecutrix told her that the appellant was forcibly committing rape on her and gagged her mouth whenever she attempted to shout. She has categorically stated that on being asked the appellant had said that he had forcibly

brought the prosecutrix there and was committing rape on her. The testimony of Kaldina P.W.2 as also of the prosecutrix has remained wholly un rebutted in cross-examination. During arguments, Shri J.K.Shastri, learned counsel for the appellant also did not assail the finding recorded by the learned Sessions Judge that the appellant had committed sexual intercourse with the prosecutrix. The testimony of Dr. Sangita Tirkey P.W.8 also established beyond doubt that forcible sexual intercourse had been committed with the prosecutrix since she found that there was a complete and fresh rupture of hymen of the prosecutrix who was experiencing pain in her private parts. It is thus established beyond doubt that the appellant had committed sexual intercourse with the prosecutrix inside the kitchen room of the school.

9. The only point which now requires consideration in this appeal is whether the sexual intercourse committed by the appellant with the prosecutrix was with her consent. It is pertinent to note that in cross-examination paragraph 17 of the prosecutrix the appellant had taken the stand that the prosecutrix had falsely implicated him due to a family dispute. This defence taken by the appellant wholly demolishes the theory of consent of the prosecutrix during rape. The medical evidence of Dr. Sangita Tirkey P.W.8 also negatives the defence of consent taken by the appellant since she found that the hymen of the prosecutrix had a complete and fresh rupture along with pain experienced by the prosecutrix in her private parts. The prosecutrix has in her testimony paragraphs 6 & 16 clearly stated that the appellant had forcibly committed rape on her and had gagged her mouth whenever she attempted to shout. This is also corroborated by Kaldina P.W.2 in paragraph 5 of her testimony. No

explanation whatsoever was offered by the appellant in his examination under Section 313 Cr.P.C.

10. Under Section 114-A of the Evidence Act where it is proved that the accused/appellant had committed sexual intercourse with the prosecutrix and the prosecutrix stated in her evidence before the Court that she did not consent to the sexual intercourse, the Court shall draw a presumption that the prosecutrix did not consent to the sexual intercourse. There is nothing on record to show that the prosecutrix was in love with the appellant or had gone to meet him. The testimony of Kaldina P.W.2 clearly shows that the appellant was not even on visiting terms at their house. As held in State of M.P. v. Balu 2005 Supreme Court Cases (Cri) 270 (Para 14), the defence of false implication due to previous animosity thus clearly negatives the defence of consent taken by the appellant. The evidence clearly shows that mother of the prosecutrix had sent her on a cycle to bring *Soyabeen* chunks from the Khan Shop and the appellant had forcibly taken the prosecutrix to the school room after she gave her cycle to Pratap. Thus there is no material on record to show that the prosecutrix had consented to the sexual intercourse.

11. The burden to prove that age of the prosecutrix on the date of occurrence was less than 16 years is on the prosecution. The evidence of the parents is the best evidence for determination of the age of the prosecutrix. If there is cogent and reliable evidence on record to prove the age of the prosecutrix on the date of occurrence, the opinion of the Radiologist who conducted the ossification test that the prosecutrix was within range of 15 to 17 years of age would not be sufficient and binding upon the court to discard ocular evidence, as

was held by the Apex Court in Vishnu Alias Undrya v. State of Maharashtra (2006) 1 SCC (Cri.) 217. The opinion of the Radiologist, since he is not a witness of fact is merely to assist the Court and is really of an advisory character and not binding on the witnesses of fact. The legally permissible margin of error of two years on either side, inherent in it, shows that it is merely an estimation of age, not of binding nature and would not dislodge oral evidence of parents and other relevant material on record regarding age of the prosecutrix, if the same is reliable and stood un rebutted.

12. The prosecution neither proved the report of ossification nor examined the Radiologist Dr. George. Learned Sessions Judge asked Dr. Sangita Tirkey P.W.8 to give an opinion on the basis of the report of Radiologist. However, Dr. Sangita Tirkey P.W.8 was not a Radiologist and thus not an expert to give any opinion as to the age of the prosecutrix. In her estimation itself she had, while examining the prosecutrix, given her age as 13 years vide report Ex.P.18. Seizure memo Ex.P.8 of the birth register of the prosecutrix maintained by the Kotwar of Village Bhandri clearly revealed that date of birth of the prosecutrix was entered therein as 26.11.1991.

13. The prosecutrix P.W.1 had also stated that she was aged 13 years on the date of occurrence. Her mother Kaldina P.W.2 had also deposed categorically that the prosecutrix was aged only 13 years. The testimony of the prosecutrix revealed that she was studying in class VIII. Cross-examination of Kaldina P.W.2 also revealed that the prosecutrix had never failed in any class. The learned Sessions Judge, while recording evidence of the prosecutrix, had also made an estimation of the age of the prosecutrix as 13 years. To summarize,

following material was available on record regarding the age of the prosecutrix:

- a) In the estimation of the learned Sessions Judge while recording her evidence on 10.1.2006 i.e. atleast six months after the occurrence the age of the prosecutrix was estimated at 13 years.
- b) There was a positive assertion by Dr. Sangita Tirkey P.W.8 in her report Ex.P.19 after examining the prosecutrix on 28.7.2005 that the age of the prosecutrix was 13 years.
- c) The seizure memo of birth register maintained by Kotwar of village Bhandri also mentioned that date of birth of the prosecutrix was recorded as 26.11.1991 meaning thereby that the prosecutrix was between 14 to 15 years of age.
- d) There was a positive assertion by Kaldina P.W.2 that the prosecutrix was aged 13 years which was wholly unrebutted in cross-examination.
- e) The testimony of the prosecutrix P.W.1 and Kaldina P.W.2 was wholly unrebutted that the prosecutrix was studying in class VIII and had never failed in any class. Even if it is presumed that the prosecutrix was admitted in Class-I at the age of 5 years, her age on the date of occurrence would be 13 years, as she should be studying in class VII then.
- f) No suggestion was given by the defence during cross-examination of the prosecutrix or her mother Kaldina P.W.2 that the prosecutrix was aged more than 16 years.
- g) Dr. Sangita Tirkey P.W.8 not being a Radiologist was not an expert to opine on the basis of the Radiological examination report.

14. In this view of the matter, the learned Sessions Judge committed an error in drawing a conclusion merely on the basis of the findings recorded by Dr. Sangita Tirkey P.W.8 regarding the

development of secondary sexual characters of the prosecutrix and the unproved document i.e. the ossification test report that her age was more than 16 years.

15. The oral and unimpeachable evidence led by the prosecution relating to age of the prosecutrix thus establishes that the prosecutrix was aged less than 16 years on the date of occurrence. In this view of the matter, her consent, if any in the sexual intercourse by the appellant was wholly immaterial under clause sixthly of Section 375 I.P.C.

16. In this view of the matter, conviction of the appellant for the offences under Sections 363, 366, 376(1) and 341 of I.P.C. and the sentence awarded thereunder are well founded and do not call for any interference.

17. This appeal being devoid of merit is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

10.08.2006